ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION I

CA07-892

PATRICIA ENGLAND and
JACK ENGLAND

March 12, 2008

APPELLANTS

APPEAL FROM THE BENTON COUNTY CIRCUIT COURT
[NO. CV2004-606-1]

V.

JOHN D. ALSTON, M.D., a/k/a JACK D. ALSTON, M.D. and NORTHWEST ARKANSAS SURGICAL CLINIC, P.A.

HON. TOM J. KEITH, CIRCUIT JUDGE

AFFIRMED

APPELLEES

Patricia and Jack England appeal from a defendants' verdict in a Benton County jury trial of a medical malpractice case against Dr. John Alston and the Northwest Arkansas Surgical Clinic. They argue that this case should be reversed and remanded because the trial court erred in: 1) denying their *Batson* challenge; and 2) denying their motion in limine and allowing evidence that they had filed another lawsuit relating to a separate act of negligence. We affirm.

Because the Englands do not challenge the sufficiency of the evidence, only a brief recitation of the facts is necessary. Patricia England is a 58 year-old woman who suffers from numerous medical problems, including rheumatoid arthritis, Meniere's Disease (a condition whereby the sufferer experiences extreme vertigo), lupus, a heart attack in 1977, multiple pulmonary embolisms, numbness in her legs, Reynaud Syndrome, daily headaches, a hiatal

hernia, and back and knee problems. She has been receiving social-security disability benefits since 1988.

On January 27, 2003, John Alston preformed an "open Nissen fundoplication" on Patricia. The procedure was intended to treat Patricia's gastroesphageal reflux disease. Previously, she underwent a laparoscopic Nissen fundiplication at the hands of another surgeon; however, the procedure was unsuccessful. Within a week of Dr. Alston's operation, Patricia developed abdominal pain, and on February 2, 2003, Dr. Alston performed emergency surgery to repair a perforation. In the course of the surgery, Dr. Alston removed a portion of Patricia's stomach. Later, another surgeon performed further exploratory surgery that resulted in a complete removal of Patricia's stomach. On April 27, 2004, Patricia and her husband, Jack England, filed suit against Alston and the Northeast Arkansas Surgical Clinic, alleging medical malpractice.

The Englands first argue that the trial court erred in denying their *Batson* challenge. After voir dire, during which a number of venire members were excused for cause, the trial judge awarded each of the parties four peremptory challenges. The judge stated that he intended to select an alternate juror and then instructed the clerk to draw twenty-one names from the venire. After the parties made their strikes, the judge seated the jurors in the order that they were selected. An individual with a Hispanic name, Antonio Valois, was struck by Alston. When he did not appear on the panel, the Englands objected, arguing:

> Let me say this. He's a minority and he was stricken and I would like for it to be on the record I'm kind of challenging the reason why he was struck. I know that peremptories are supposed to be—you have a free hand, but a minority has

> a right to be on a the jury. By Supreme Court ruling they have a right to be. In this particular case this gentleman I don't think ever spoke up, there's nothing in particular about him, so I have concerns as to the fact that he's a minority being stricken from the jury without any—in other words, if I'm an attorney and I'm viewing these names, I'm looking at my notes to see what it was about a particular person, why I might not want him. This gentleman never spoke up but he's a minority, so what's the reason that the Defense would choose him? How would they single him out I guess is my concern if it wasn't a racial profile.

The trial judge rejected the challenge out-of-hand, asserting that "there's no pattern here."

The Englands argue that a "single constitutionally infirm strike" is sufficient to warrant reversal. They assert that "the only Hispanic" of the twelve jurors chosen for the panel was stricken and that the "surrounding facts and circumstances suggested invidious discrimination, as there was no questioning of Mr. Valois and nothing in the record to indicate why he was stricken." They contend that this case required a "bare-bones" explanation from Alston because the strike exercised resulted in a "disproportionate exclusion in that the only minority Hispanic was stricken." We find this argument unpersuasive.

When we review a *Batson* challenge, we will reverse a circuit court's ruling only when its findings are clearly against the preponderance of the evidence. *Owens v. State*, 363 Ark. 413, 214 S.W.3d 849 (2005). We further accord some measure of deference to the circuit court, because it is in a superior position to make determinations of juror credibility. *Id.*

In *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998), our supreme court set out a three-step process that trial judges are required to follow in evaluating *Batson* challenges. The first step requires the opponent of the peremptory strike to present facts that show a prima facie case of purposeful discrimination. *Id.* This first step is accomplished by showing the

following: (a) the opponent of the strike shows he is a member of an identifiable racial group; (b) the strike is part of a jury-selection process or pattern designed to discriminate; and (c) the strike was used to exclude jurors because of their race. *Id.* Once a prima-facie case of discrimination has been shown, the process moves to the second step, wherein the burden of producing a racially neutral explanation shifts to the proponent of the strike. *Id.* This explanation, according to *Batson*, must be more than a mere denial of discrimination or an assertion that a shared race would render the challenged juror partial to the one opposing the challenge. *Id.* If a race-neutral explanation is given, the inquiry proceeds to the third step, in which the trial court must decide whether the opponent of the strike has proven purposeful discrimination. *Id.*

We hold that the trial court's finding that the Englands had failed to make a prima facie case was not clearly against the preponderance of the evidence. Their challenge consisted solely of their trial counsel's observation that Mr. Valois was a "minority" and that he did not speak up during voir dire. Merely using a peremptory strike on a minority is, in itself, insufficient to make a prima facie case of purposeful discrimination. *See Moore v. State*, 92 Ark. App. 453, 215 S.W. 3d 688 (2005); *see also Flowers v. State*, 362 Ark. 193, 208 S.W.3d 113 (2005). Despite their assertions, the Englands did not establish a "pattern" of discriminatory strikes. First, they did not establish at trial that Valois was even a "minority," much less that he was the *only* minority among the twenty-one potential jurors who could have been seated and were thus subject to the parties' peremptory strikes. Indeed, Valois was not even the only potential juror with a Hispanic surname; there was another individual, Jaime Ramos,, who also

had a Hispanic surname. Furthermore, the Englands did not make a record concerning the ethnicity or minority status of the married women. Finally, the Englands' assertion that Valois did not speak during voir dire was not conclusive on the question of whether striking him was a manifestation of discriminatory intent. It is just as likely that Valois's lack of involvement in the voir dire process was the factor that singled him out to be struck. While we do not condone invidious discrimination, by the same token, we do not jump to the conclusion that it is being practiced. Without more, we cannot conclude that the trial judge's determination that the Englands had not made a prima facie case was clearly against the preponderance of the evidence.

For their second point, the Englands argue that the trial judge erred in denying their motion in limine and allowing evidence that they had filed another law suit relating to a separate act of negligence. After the removal of her stomach, Patricia had a direct infusion line surgically implanted. One day, while attempting to change the dressing, her home health care nurse accidently cut the infusion line, requiring that the line be removed. The Englands filed suit against the Benton County Home Health, Inc., the company that employed the home health care nurse. Prior to trial, the Englands filed a motion in limine that sought to exclude testimony concerning their suit against Benton County Home Health, Inc. Alston and the clinic successfully opposed the motion, arguing that if the evidence were excluded, "the jury might believe all of the alleged pain, suffering and mental anguish and other damages suffered by the Plaintiff since the surgery are related to the surgery," and that evidence of the health care nurse cutting the infusion line "and the resulting lawsuit are relevant and highly probative

on the issues of damages." At a hearing on the motion, Alston's counsel specifically noted that the damages that the Englands were seeking "includes things such as weight loss and energy level and loss of the times when she loses her hair and other nutritional problems." In denying the motion in limine, the trial judge found that the evidence would be admitted as "relevant evidence."

The Englands argue that testimony concerning their other litigation was "irrelevant and unfairly prejudicial" and should not have been permitted. Citing *Carter v. Missouri Pacific Railroad Co.*, 284 Ark. 278, 681 S.W.2d 314 (1984), they assert that where they "stipulated" to the other injury, and expressly testified that they were not holding Alston responsible for it, the fact that a lawsuit was filed was no longer an issue and should not have been admitted because it had "no bearing" on the proceedings. Accordingly, the trial court should have concluded that the evidence of the other lawsuit was more prejudicial than probative. We disagree.

Trial courts have broad discretion in their evidentiary rulings, and we will not reverse a trial court's ruling on the admissibility of evidence absent an abuse of that discretion. *McCoy v. Montgomery,* 370 Ark. 333, ___ S.W.3d ___(2007). Our rules favor the admission of evidence. Pursuant to Arkansas Rule of Evidence 401 (2005), "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Arkansas Rule of Evidence 402 states "all relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this

State. Evidence which is not relevant is not admissible." But the process does not end there. A circuit court must first determine whether evidence is relevant and then determine whether the evidence's probative value outweighs any possible prejudicial effect. Ark. R. Evid. 403. However, like all evidentiary rulings, balancing probative value against unfair prejudice is a matter left to the sound discretion of the circuit court. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994). The lower court's decision on such a matter will not be reversed absent a manifest abuse of discretion. *Billett v. State*, 317 Ark. 346, 877 S.W.2d 913 (1994).

At trial, Patricia testified on direct examination that she struggled every day to keep her weight up and "lots of times I lose that struggle." She was dependent on her infusion line for supplying her with nutrients. Furthermore, before she had her stomach removed, she was "still alive" and could "do things," but now she cannot cook, clean, change a bed, do dishes, drive a car, visit friends, or anything else but sit on a couch or chair and watch TV or read.

The Englands' trial counsel broached the subject of the pending lawsuit against Benton County Home Health Care first. Patricia described how the home-health nurse cut the infusion line while attempting to remove a dressing. She stated that it was several months before the line could be re-inserted, during which time her weight dropped to 82 pounds. However, she also stated that she did not hold Dr. Alston responsible for that mishap.

On cross-examination, however, Patricia conceded that since the infusion line was replaced, her weight has stabilized and improved. This testimony clearly undercut her assessment of her diminished quality of life, which she was attempting to blame on her stomach problems. Patricia also admitted that she had previously ascribed most of her current

complaints to maladies that had pre-existed her stomach surgeries. It is evident to us that testimony concerning the cut to the infusion line and its effects was important in determining the effect that Patricia's stomach surgeries had on her quality of life, which made the testimony highly probative on the question of what damages she could attribute to her stomach surgeries. Accordingly, we conclude that the trial judge did not abuse his discretion in admitting testimony concerning it.

We acknowledge that the question of whether or not the trial court should have admitted evidence that the Englands filed a lawsuit over the alleged cutting of the infusion line is a closer case. However, we do not believe that the trial court abused its discretion in admitting that evidence because the fact that the Englands considered the cutting of the infusion line serious enough to file a lawsuit over the matter is relevant. Furthermore, we do not believe that it was unduly prejudicial in that it was brought out during voir dire that a large percentage of the jury had filed lawsuits, which we believe diminishes any potential prejudice that might possibly be attributed to this fact. Certainly, the Englands cannot assert that it had a jury that was predisposed to view a person's resort to the courts unfavorably.

The Englands' reliance on *Carter, supra* does not compel a different result. In *Carter*, a case involving a collision of an automobile with a train, the parties agreed that there would be no mention of the plaintiff's two divorces, including no voir dire on the subject. Yet, the defense violated the agreement in an attempt to prejudice the jury against the plaintiff. In the instant case, there was no violation of an agreement not to mention the lawsuit; the trial court rejected the England's motion in limine. Furthermore, as noted previously, in the instant case,

there was extensive voir dire concerning whether the prospective jurors had filed lawsuits and the nature of those suits. Clearly there was nothing considered stigmatizing about this fact. Accordingly, we believe that the Englands' reliance on *Carter* is misplaced.

Affirmed.

BIRD and MARSHALL, JJ., agree.